No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. NEALON,

Appellant,

v.

HARRY W. HILL, as Receiver of Intermountain Building & Loan Association, a corporation,

Appellee.

Brief of Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

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LESLIE C. HARDY,
Attorney for Appellant

THOMAS W. NEALON,
In Propria Persona

REPUBLIC AND GAZETTE PRINTERY, PHOENIX

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PRELIMINARY STATEMENT

This is an appeal by Thomas W. Nealon from an order of the United States District Court for the District of Arizona, sitting at Phoenix, made and entered on December 7, 1942 (R. 243) awarding petitioner compensation for services performed by appellant as an attorney for creditors of Intermountain Building & Loan Association, an Utah corporation, wherein creditors of that association, individually, and as a class, instituted a suit in the United States District Court for the District of Arizona for the appointment of a receiver of the assets of that association; and from an order of the District Court entered on November 29, 1944 (R.

657) which denied and dismissed appellant's petition filed March 31, 1944 (R. 599) to rehear and review the order of December 7, 1942, and for compensation for services rendered by appellant as attorney for the receiver, and in the ancillary receiverships.

STATEMENT AS TO JURISDICTION

Jurisdiction of District Court

A class suit, wherein certificate holding creditors of Intermountain Building & Loan Association petitioned for a receiver of the association, was filed in the United States District Court for the District of Arizona, entitled:

> "Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, Plaintiffs, vs. Intermonutain Building & Loan Association, a corporation, Defendant," No. E-268 Phoenix (R. 2-34).

In that suit the petitioning creditors, as plaintiffs, alleged that jurisdiction was conferred upon the District Court by reason of diversity of citizenship of the parties thereto, plaintiffs being residents of Arizona, and the defendant association being a corporation organized under the laws of Utah, and doing business in Arizona, and in which it was alleged that the amount in controversy exceeded $3,000.00 (R. 2-3).

From two interlocutory orders entered in the suit, one appointing a receiver pendente lite, and the other enjoining the association from removing assets

from Arizona, the association appealed to this Court, which affirmed.[1]

Jurisdiction of the suit by the District Court was conferred by Sec. 24, Judicial Code, as amended. (Title 28, Sec. 41, USCA). That section, as it applied to the suit, is as follows:

> "First: Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *, or (c) is between citizens of a State and foreign States, citizens, or subjects * * *."

Appellant filed a petition on October 15, 1937 in the suit requesting attorney's fees for services rendered on behalf of the petitioning creditors. (R. 108-164). The petition was heard on December 20, 1937. (R. 245). On December 7, 1942—five years after the petition was heard—the trial court entered an order which purported to be a final order awarding appellant total fees for services rendered to the petitioning creditors, and also to the receiver. (R. 243-248). On March 31, 1944 appellant filed a petition to rehear and review the order of December 7, 1942. (R. 599). The trial judge entertained and considered appellant's petition of March 31, 1944 to rehear and review the order of December 7, 1942 and entered an order on November 29, 1944 granting appellee's motion to dismiss the petition, and denied and dismissed the petition with prejudice. (R. 657).

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[1] *Intermountain Building & Loan Association, et al, v. Gallegos, et al,* 9 Cir., 78 Fed. 2d 972; cert. den. 296 U.S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

The District Court had jurisdiction to entertain appellant's petition filed October 15, 1937 in the class suit for attorney's fees payable out of funds recovered for the members of the class who accepted the benefits derived for them by appellant.

> *Monaghan* v. *Hill, as receiver,* 9 Cir., 140 Fed. 31.

The District Court had jurisdiction to entertain appellant's petition filed march 31, 1944 in the class suit which requested, for the first time, an allowance for compensation for services performed by appellant as attorney for the receiver.

> *Drilling & Exploration Corporation* v. *Webster,* 9 Cir., 69 Fed. (2d) 416.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Sec. 128 (a) of the Judicial Code, as amended (Title 28, Sec. 225 USCA) which provides:

> (a) *Review of Final Decisions.* The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal the final decisions—
>
> First. In the district courts, in all cases save where direct review of the decision may be had in the Supreme Court under section 345 of this title.

Sec. 240-8 (c) of the Judicial Code (Title 28, Sec. 230 USCA) provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Appellee, as receiver, on May 8, 1944 filed an answer to appellant's petition filed March 31, 1944 to review and rehear the order entered December 7, 1942. (R. 632). The Court ordered a pre-trial conference under Rule 16 of the Federal Rules of Civil Procedure and, following that order, counsel for the petitioner (appellant) and receiver (appellee) together formulated the issues which were approved and adopted by the trial court on June 7, 1944. (R. 643-651).

A motion to submit the petition was filed November 21, 1944. (R. 651). Respective counsel on November 22, 1944 stipulated to submit the petition for decision on briefs theretofore filed by them (R. 653), and it was so ordered by the trial court. (R. 653).

Appellee on November 22, 1944 moved for an order denying and dismissing the petition filed by appellant on March 31, 1944 to rehear and review the order entered December 7, 1942. (R. 653). The trial court entered a final order on November 29, 1944, granting appellee's motion to deny and dismiss the petition, and dismissed the petition with prejudice. (R. 657).

The trial court by entertaining, considering and disposing of the petition filed by appellant on March 31, 1944 to review and rehear the order of December 7, 1942, as above recited, enlarged the time for appealing from the order of December 7, 1942.

Bowman v. *Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. *Northern Illinois Co.* 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

The order entered December 7, 1942 awarding compensation to appellant was entered on the Clerk's docket the same day. (R. 669). The order entered November 29, 1944, denying a review and rehearing of the order entered December 7, 1942, was entered on the Clerk's docket November 29, 1944. (R. 670). The orders are now final as of the date of their entry. Notice of appeal from both orders was filed December 7, 1944. (R. 666).[2] The bond on appeal was filed on the same day the notice of appeal was filed. (R. 667).

RECORD ON APPEAL

Upon motion of appellant, the printed transcript of record filed in this Court in the cause of Elizabeth G. Monaghan vs. Harry W. Hill, as receiver, No. 10408, was ordered filed as an exhibit in the lower court in support of appellant's petition filed March 31, 1944. (R. 656). Upon motion of appellant, the trial court ordered said printed transcript of record to be transmitted to this Court instead of a certified copy thereof. (R. 670-672). Respective counsel stipulated that said printed transcript of record could be utilized on this appeal and bound in as part of the transcript of record on this appeal. (R. 684-686).

Appellant filed a designation of contents of record on appeal pursuant to Rule 75 (a) of the Rules of Civil Procedure. (R. 672-676). Appellee filed a designation of additional contents of record on appeal. (R. 676-678).

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[2]No opinion in support of either order was delivered by the trial judge.

STATEMENT OF THE CASE

This appeal of Thomas W. Nealon had its genesis in Intermountain Building & Loan Association, and the fraudulent conduct of the officers of that association in dissipating its assets.[2]

The appellant rendered extensive and valuable rsevices as one of the attorneys for the creditors of the Intermountain Building & Loan Association in a creditors' class suit which eventuated in the appointment of a receiver for that association by the United States District Court for the District of Arizona. Appellant also rendered extensive and valuable services as the attorney for Henry S. McCluskey, the first receiver of the association, and also in the ancillary receiverships.

An extensive narrative of the facts underlying the extent and value of the professional services appellant rendered to these creditors, going back as they do many months prior to April, 1933 (R. 110), seems unnecessary, because this Court has reviewed those facts upon the several related appeals which reached this Court. Those appeals reveal the persistent and successful efforts of appellant to marshall the as-

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[2]The background of Intermountain has been reviewed by this Court on several occasions in:

Intermountain Building & Loan Association, et al v. Gallegos, et al, 9 Cir., 78 Fed. 2d 972; cert. den. 296 U.S. 639, 80 L. Ed. 454, 56 S. Ct. 172.

Guadalupe R. Gallegos, et al v. Lloyd R. Smith, Corporation Commissioner, 9 Cir., 111 Fed. 2d 805; cert. den. 311 U.S. 668, 85 L. Ed. 429, 61 S. Ct. 27.

Julius G. Brashear v. Intermountain Building & Loan Association, et al, 9 Cir., 109 Fed. 2d 857; cert. den. 311 U.S. 655, 85 L. Ed. 419, 61 S. Ct. 9.

Monaghan v. Hill, as Receiver, 9 Cir., 140 Fed. 2d 31.

sets of Intermountain into a receivership for the benefit of its numerous creditors, and to preserve those assets from dissipation by the fraudulent practices of its officers and their consorts.

It is sufficient to say that Nealon, with his co-solicitor, Elizabeth G. Monaghan, as the solicitors for the petitioning creditors, relentlessly pursued the officers of the Intermountain until finally, with the approval of this Court, and the Supreme Court, the total remaining assets of Intermountain finally were husbanded in the custody of a receiver.

Intermountain is an Utah corporation. During 1933 one Malia was the Bank Commissioner of that state. None opposed the receivership more vigorously than Malia (R. 133 to 139) although characterized by this Court as a public official who "had shown himself not to be a proper person to husband the dwindling assets of the failing association." (78 Fed. 2d 972, 983).

Nonetheless Nealon, and his co-counsel, saved and preserved for the creditors of Intermountain gross assets valued at more than $2,000,000, and through these efforts almost 3,000 creditors elected to avail themselves of the suit. (140 Fed. 2d 31, 33).

Henry S. McCluskey was appointed permanent receiver of Intermountain on the 8th day of February, 1936. (R. 400). He continued as such until April 1, 1937 when he was succeeded by Harry W. Hill, the present receiver and appellee herein. McCluskey rendered a final and complete accounting of his receivership (R. 396) and was discharged. (R. 579). While McCluskey acted as receiver, appellant was his counsel under appointment of the district court. (R. 378). During that time appellant pre-

pared and presented 549 petitions, applications and orders pertaining to the receivership affairs, many of which required extensive study of questions of related law. (R. 471, 605).

On October 15, 1937 appellant filed his petition in the district court for an allowance of attorney's fees for services rendered and expenses incurred in the preparation and trial of the creditors' suit. (R. 108). He then claimed, as the petition discloses, no compensation for the extensive services rendered to the receiver, or in connection with the ancillary receiverships. At the time appellant's petition came on for hearing, he filed a written amendment or supplement to it requesting an allowance on account of partial attorney's fees in the amount of $12,500, (R. 594) and orally explained his reason for so doing. (R. 371). The trial court by the order entered December 7, 1942 awarded appellant $12,500, less $7,500, which had been previously paid to him, plus out-of-pocket expenses. By that order the trial court purported to make a final award to appellant for all services he had performed, not only to the petitioning creditors but also to the receiver. (R. 243-248). The amount of this award was made by the trial court notwithstanding several experienced and reliable attorneys testified, without contradiction, that Nealon's services in the class suit alone were worth not less than $100,000. (R. 165, 217, 292, 316, 321). *Monaghan* v. *Hill,* 9 Cir., 140 Fed. (2d) 31.

Appellant's petition for fees for services rendered to the creditors in the suit fully and clearly portrays the extent of the services performed by him in the preparation of the suit and the conduct of it through a hazardous and difficult course over a period of three and one-half years down to the appointment of McCluskey as the permanent receiver. (R. 108).

The final report of McCluskey, as receiver, likewise fully and clearly discloses not only the extensive and valuable services performed by him as receiver, but also the no less extensive and valuable services performed by appellant as his attorney, and also in the ancillary receiverships. (R. 396).

Appellant's petition (R. 108), in addition, is a factual resume of the background of Intermountain before and during the time of the litigation leading to the receivership, and consequently a restatement of the facts as there narrated is unnecessary. The facts pertinent now were reviewed and stated by this Court in *Monaghan* v. *Hill,* 9 Cir., 140 Fed. (2d) 31, heretofore cited.

Appellant on March 31, 1944 filed a petition to review and rehear the order entered December 7, 1942. (R. 599). By that petition appellant again enumerated the services performed on behalf of the creditors in the suit requesting the appointment of a receiver for Intermountain, and, for the first time, claimed compensation for services rendered to the receiver, and for services performed in connection with the ancillary receiverships.

The petition filed March 31, 1944, was supported by the affidavit of appellant. (R. 620). The affidavit was not controverted, save as the petition which the affidavit supported was controverted. It sets forth in careful detail the services performed in the ancillary receivership, and also the services rendered to the receiver in the primary receivership. Appellant estimated the reasonable value of those services in the amount of $40,500. (R. 631).

Appellee, as receiver, on May 8, 1944 answered the appellant's petition filed March 31, 1944. (R. 632).

This answer objected to the jurisdiction of the court to entertain the petition; asserted that it failed to state a claim upon which relief can be granted; pleaded that the order entered December 7, 1942 was a final appealable order; and that no appeal was taken therefrom within time, or at all. The answer further pleaded payment by the receiver of the amount of the compensation awarded to appellant by the order entered December 7, 1942; sets forth the receiver's check *ipsissimis verbis;* pleads acceptance of the check and receipt of the proceeds by appellant.

An order following the pre-trial conference was entered June 7, 1944. (R. 643). This order left as the principal disputes at issue the value of the services performed by appellant; the right to claim compensation for services, in addition to the compensation awarded by the order entered December 7, 1942; the question of the finality of that order; and payment.

The trial court considered the petition filed March 31, 1944, and the related proceedings, and by an order entered November 29, 1944, denied appellant further relief (R. 657) from which appellant also appeals. (R. 666).

QUESTIONS INVOLVED

The questions involved are:

(a) The error of the trial court in entering the order of December 7, 1942 which awarded to appellant $12,500, less $7,500 which had already been paid to appellant, as and for a total and final award for all services rendered by appellant not only to the creditors of Intermountain, but also for services

rendered to the receiver, and in the ancillary receivership.

(b) The error of the trial court in denying and depriving appellant of just and adequate compensation for services rendered by him to the creditors in the class suit, and to the receiver, which the record herein, and the decision and judgment of this Court in *Monaghan* v. *Hill,* supra, disclose constituted an abuse of sound judicial discretion.

(c) The error of the trial court in entering the order of December 7, 1942, which purported to compensate appellant for services rendered by him to the receiver, and in the ancillary receivership matters, when in fact no issue had been framed which justified or authorized an award for those services.

(d) The error of the trial court in denying and dismissing appellant's petition filed on March 31, 1944 to review and rehear the order entered by the trial court on December 7, 1942.

HOW QUESTIONS ARE RAISED

The questions on this appeal are raised by the petitions filed by appellant in the class suit on October 15, 1937 and March 31, 1944 in the lower court for an allowance of compensation for services rendered by him, as heretofore recited, and the appeal from the orders of December 7, 1942 and November 29, 1944 entered on those petitions.

STATEMENT OF POINTS

Appellant filed a Statement of Points in the lower court as required by Rule 75 (d) of the Rules of Civil Procedure. (R. 659). The Statement of Points is adopted by appellant in this Court in aid of this appeal. (R. 682).

THE ORDER ENTERED DECEMBER 7, 1942 IS NOW REVIEWABLE ON THIS APPEAL.[4]

The order entered by the trial court on December 7, 1942, which purported to award to appellant total and final compensation for all services was not appealed from until December 7, 1944. (R. 666). Measured by Sec. 128 (a) of the Judicial Code, as amended, (Title 28, Sec. 225 USCA) the appeal is out of time. However, on March 31, 1944 appellant filed a petition to review and rehear the order entered December 7, 1942. (R. 599). The trial court entertained, considered and disposed of the petition as appears from the following proceedings had on it:

(a) The appellee, as receiver, on May 8, 1944 filed an answer to appellant's petition filed March 31, 1944. (R. 632).

(b) The trial court, after the petition and answer were filed, ordered a pre-trial conference, and by an order entered June 7, 1944, adopted the issues formulated by respective counsel, thus entertaining the petition and answer and also the issues as formulated. (R. 643).

(c) Appellant on November 21, 1944 moved to submit for decision the petition filed by appellant March 31, 1944. (R. 651).

(d) Counsel on November 22, 1944 stipulated to submit the petition for consideration and decision by the trial court on briefs which had been theretofore filed (R. 652), and the trial court so ordered. (R. 653).

(e) Appellee on November 22, 1944 filed a motion for an order to deny and dismiss the petition. (R. 653).

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[4]This question is discussed less extensively beginning at page 4, supra.

(f) After considering the foregoing proceedings, and the issues raised by them, the trial court on November 29, 1944 entered a final order denying the petition and dismissing it with prejudice. (R. 657).

The foregoing proceedings in the lower court which eventuated in the order entered November 29, 1944 (R. 657) enlarged the time for appeal to this Court from the order entered December 7, 1942. Thus, the award of compensation made to appellant by the order of December 7, 1942 is open for review by this Court.

Bowman v. *Loperno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201, we submit, authorizes the appeal.

In that case the judgment of this Court (110 Fed. 2d 348) was reversed by the Supreme Court. Bowman in 1935 sought an extension under Section 74 of the Bankruptcy Act. In 1936 the District Court, on petition for review, recommended that the proposal for an extension be not confirmed and that the debtor be adjudged a bankrupt. Successive petitions for review and rehearing were filed by Bowman and in ~~1939~~ the District Court, out of time, denied a petition for review filed in 1937. This Court refused to entertain the appeal from the order of the District Court as being out of time. 110 Fed. (2d) 348. The Supreme Court (311 U. S. 266) reversed and said:

> "The circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time

for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

"We hold that the court below should have entertained the appeal.

"The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion."

Subsequently the mandate of the Supreme Court came down, and, upon reconsideration of the appeal from the district court, this Court reversed the district court.

In Re Bowman, 9 Cir., 118 Fed. (2d) 742.

This appeal presents a parallel situation. Assuming *arguendo* that it may be distinguished by the assertion that Bowman v. Lopereno, supra, involved a proceedings in bankruptcy, as did the later cases of Wayne United Gas Co. v. Owens-Illinois Glass Co. and Pfister v. Northern Illinois Co., supra,[5] nevertheless the rule developed in those cases is not peculiar to bankruptcy but is a rule of equity which bankruptcy has appropriated. The Supreme Court in the Wayne United Gas and Pfister cases said:

"It is true the bankruptcy court applies the doctrine of equity * * *" (300 U. S. 136)

"Courts of bankruptcy are courts of equity without terms * * *" (317 U. S. 152)

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[5]300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.
317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

Likewise, proceedings in equity, such as receiverships, are not restricted by terms of court. Since the adoption of Rule 6 (c) of the Rules of Civil Procedure,[6] terms of court are now anachronistic.

Sprague v. *Ticonic National Bank,* 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777.

It follows that the order entered December 7, 1942 is now appealable and reviewable by this Court.

SPECIFICATION OF ERRORS

I.

The order entered by the trial court on December 7, 1942 which purported to allow and award appellant total compensation for all services rendered by him to the petitioning creditors of Intermountain in the class suit, and the creditors who elected to avail themselves of that suit, is grossly inadequate and inequitable, and it is erroneous for the reason that the award made to appellant by the order does not justly and adequately compensate appellant for the services rendered by him in the suit when measured by the hazards encountered, the labor expended, and the results obtained.

II.

The order entered by the trial court on December 7, 1942 which purported to allow and award appel-

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[6]Rule 6(c): UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

lant, as and for a final award, total compensation for all services rendered by him is erroneous for the reason that the petition filed by appellant on October 15, 1937, as amended and supplemented, requested an allowance at that time of partial compensation for services rendered by appellant in the class suit only, whereas the trial court, by the order, purported to award appellant total and final compensation for services rendered to the petitioning creditors, to the receiver, and in the ancillary receiverships.

III.

The order entered by the trial court on December 7, 1942 is erroneous for the reason that it purports to award appellant compensation for all services rendered by him, whereas appellant at that time had not petitioned and requested compensation for services rendered to the receiver, and for services rendered in the ancillary receiverships, and consequently appellant was deprived of the opportunity and right to claim and prove the value of such services and to be heard thereon.

IV.

The order entered by the trial court on December 7, 1942 is erroneous for the reason that the petition upon which the order is founded, as amended and supplemented, claimed and requested compensation for services rendered by the appellant in the class suit only and consequently the order entered December 7, 1942 which purports to allow appellant total compensation for services rendered by him, including the services by appellant to the receiver, and in the ancillary receiverships, was beyond the jurisdiction and power of the trial court to render, in that

the order was not within the pleadings then filed or the issues then made.

V.

The trial court erred in entering the order of November 29, 1944, which denied and dismissed the petition filed by appellant on March 31, 1944 to review and rehear the order entered December 7, 1942, for the reason that the trial court entertained, considered, and disposed of the petition filed March 31, 1944, and then failed to exercise a sound judicial discretion in correcting the erroneous order entered December 7, 1942.

VI.

The trial court erred in entering the orders of December 7, 1942, and November 29, 1944, for the reason that the uncontroverted evidence which was received to support the petitions upon which the orders were entered, discloses that the amount of compensation awarded to appellant by the trial court is wholly inadequate and is not supported by the uncontroverted evidence.

VII.

The trial court erred in entering the orders of December 7, 1942, and November 29, 1944, for the reason that they constitute an abuse of sound judicial discretion in that they deprive appellant of compensation to which he is rightfully entitled and said orders unjustly enrich the receivership estate.

VIII.

The acceptance by appellant of the compensation awarded to him by the order entered December 7, 1942, less the compensation theretofore received by him, does not estop appellant from claiming addi-

tional compensation for services rendered to the petitioning creditors in the class suit, and to the receiver, and in the ancillary receiverships, for the reason that the acceptance by appellant of the compensation awarded him by the order entered December 7, 1942, was the acceptance of a minimum amount of compensation appellant was entitled to receive in all events; was less than the amount appellant reserved the right to claim; and did not compensate appellant for services rendered separately from the services rendered to the petitioning creditors, and which appellant then did not claim.

SUMMARY OF THE ARGUMENT

I.

The award made by the trial court to appellant by the order entered on December 7, 1942 is grossly inadequate and inequitable and, measured by the decision of this Court in Monaghan v. Hill, is founded upon error.

(Specification of Error I, p. 16, supra.)

An attorney who renders faithful and valuable services in a receivership proceedings is entitled to compensation in proportion to the efforts expended and the results obtained. The petition which appellant filed on October 15, 1937 (R. 108) for compensation for professional services rendered to the petitioning creditors in the class suit discloses the extent and value of the services rendered. The quality of the services are as commendable as they were beneficial to the petitioning creditors.

The petition filed by appellant on March 31, 1944 discloses the extent and value of the professional services rendered by appellant on behalf of the re-

ceiver, and in the ancillary receiverships. (R. 599). Appellant's affidavit in support of the petition then filed corroborates the extent and value of those services. (R. 620). The final report of Henry S. McCluskey, as receiver, discloses that appellant carried the legal burden of the receivership proceedings against difficult obstacles almost from the inception of the litigation until the day McCluskey, as receiver, was discharged. (R. 396). Appellant's labor extended into this Court, the Supreme Court of the United States, the District Courts of California, Oregon and elsewhere, including Wyoming and Idaho (R. 625, 626).

The pronouncement of this Court with respect to the quality of the services rendered by Elizabeth G. Monaghan applies equally to the services of appellant. In *Monaghan* v. *Hill,* this Court said:

> "A consideration of the great volume and high quality of the labor performed, the difficulty and novelty of the legal problems solved, the extreme hazard involved in the litigation which was handled for a 'reasonable' contingent fee, the high value of the property recovered, and the successful results achieved convinces us that the fee allowed is wholly inadequate."

If doubt had existed upon that question, it has been removed by the present receiver himself in the brief filed by him in *Monaghan* v. *Hill* (pps. 12, 13). The receiver there recited the character of the services performed by appellant and correctly and fairly represented to this Court the quality of those services as is revealed by the following excerpt from that brief:

> "The foregoing tends to show, as Mr. Nealon has stated, that all of the important work of this

case from the very beginning was performed by him. It is true that there is testimony by Mrs. Monaghan to the effect that Mr. Nealon did not at the beginning of the litigation want to become counsel of record for the creditors. If this is true, it may be surmised that Mr. Nealon wished to be free to be employed as attorney for the Receiver, if one should be appointed.

"But whatever the reason, it was apparent to the Court below and must necessarily be apparent to this Honorable Court from the record, that Mr. Nealon was the dominating spirit and the chief counsel in the litigation that brought the fund into court.

"While it is true that no contest was made by the receiver on the petitions filed by either Mrs. Monaghan or Mr. Nealon as attorneys, and 'no controverting evidence was offered,' still there is a direct conflict betewen the petitions filed by Mrs. Monaghan and Mr. Nealon, of which the Judge of the Court below must have taken cognizance. Mrs. Monaghan in her oral testimony did not question the statement of Mr. Nealon that 'all pleadings, briefs, or other business was formulated and dictated by me (Nealon) and prepared in my office,' nor the statement 'all of the expenses of litigation from the time the matter came into my (Nealon's) hands in the early part of 1932, to the time that the Receiver took physical possession in November, 1935, were advanced by me (Nealon) at the time they were incurred or paid.' Nor did Mrs. Monaghan question the fact that '* * * during the early part of 1932 and up to about a week prior to the petition for interlocutory decree in April, 1934, Mrs. Monaghan was in my (Nealon's) employ on a salary, but there never was at any time any partnership between us.' " (R. 613, 614).

Furthermore, the receiver again recited in that brief (p. 17) as follows:

"Viewing this case in the light of the record here, we feel that if the fee in fact was inadequate, and an abuse of discretion on the part of the District Judge, that it should have been Mr. Nealon who was here complaining and not Mrs. Monaghan, because, according to the record here, it was Mr. Nealon who 'bore the brunt of the struggle for the beneficiaries of the trust from the beginning to the end.' " (R. 615).

Undoubtedly, the order entered by the trial court on December 7, 1942 awarded compensation to appellant which was wholly disproportionate to the extent of the services performed and the benefits obtained.

II.

The order entered on December 7, 1942 purported to compensate appellant for services performed on behalf of the petitioning creditors, and also for services performed on behalf of the receiver, and in the ancillary receiverships, and consequently was beyond the jurisdiction of the trial court to enter, because the petition, upon which the order was founded requested compensation only for services rendered to the petitioning creditors and for an allowance at that time on account.

(Specification of Errors II, III and IV, pps. 16, 17, supra.)

The prayer of the petition filed by appellant on October 15, 1937 (R. 160, 161) recites as follows:

"Wherefore your petitioner prays that this Honorable Court allow to your petitioner such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the

> appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises."

Appellant then claimed no compensation for services he had performed on behalf of the receiver, and in the ancillary receiverships. No evidence offered at that time supported a claim for, or an award of, compensation for such services. That question was not before the trial court and consequently appellant was given no opportunity to be heard thereon. Appellant first claimed compensation for services performed on behalf of the receiver, and in the ancillary receiverships, by the petition he filed on March 31, 1944 (R. 599) and by the supporting affidavit. (R. 620). Nevertheless the order of the trial court entered December 7, 1942 recited that the award there made constituted "total compensation fixed and allowed for all services rendered by petitioner." (R. 246). The order further recited "that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his said petition and as attorney for the former receiver." (R. 247).

The petition filed by appellant on October 15, 1937 came on for hearing December 20, 1937. (R. 245). At that time appellant filed a petition in writing (R. 594) which recites:

"PETITION FOR ALLOWANCE AND PAYMENT OF $12,500.00 UPON ACCOUNT OF FEES TO THOMAS W. NEALON.

"Comes now Thomas W. Nealon and supplementing his verified petition for attorney's fees heretofore filed in the above entitled matter respectfully petitions the Court for an order making an immediate allowance and payment of $12,500.00 upon account of fees for services rendered the plaintiffs in the preparation and conduct of the above entitled suit.

"This petition is based upon and supplementary to the petition for attorney's fees heretofore filed by him in this matter, together with the evidence this day presented in Court in support thereof. This petition to be without prejudice to the allowance heretofore prayed for in this proceeding."

At the time the petition was heard on December 20, 1937 appellant made a preliminary statement to the trial court and he then explained and confined the purpose of the petition by the following statement (R. 288):

"I am asking for a fee, as one of the solicitors for the plaintiffs in the class suit filed for certain named plaintiffs, and those similarly situated. I (am) asking the Court to allow me such reasonable compensation for the services renated, in connection with the preparation, institution and trial of the cause, including services rendered by me on the appeal from the interlocutory decree rendered by the Ninth Circuit Court of Appeals, for my services in opposing the petition of the defendant corporation and J. A. Malia in the Supreme Court of the United States, and filed upon a Writ of Certiorari, and for my out-of-pocket expenses necessarily in-

curred and paid by me in the sum of $1,330.40, and for services in obtaining final decree providing for the conveyance of all the property of the Intermountain Building & Loan Association to the Receiver of the defendant corporation.

Subsequently, during the hearing, appellant made the following statement to the trial court (R. 290, 291):

"My prayer in the petition is for only one-half of what would be a reasonable fee for the conduct of the case, and my petition differs from that of Mrs. Monaghan in this case, in that I ask that if the Court does not see proper at this time to allow the whole fee, that it make an allowance upon account. I think the latter is proper under the circumstances of the case, and under the evidence which I shall introduce, that a partial allowance at this time is the only way in which justice can be done to all parties, considering the amount of funds in the hands of the Receiver, the necessity, I might say, of the declaring a dividend, and the fact that it will probably be some time before all of the assets can be converted into cash. At the end of the case, at the end of the hearing I shall ask the right to file motions to that effect, and the petition along with them, so as to bring it directly before the Court, may be supplemental to the petition already filed."

Finally, near the close of the hearing, appellant again stated (R. 371):

"Now, I am looking at this case a little bit from that viewpoint of a man seventy years of age. I don't think in the present state of the case that all of the fees should be paid at the present time. Witnesses on the stand have testified to the part I was going to bring up myself,

but I do think it will be only fair to the attorneys in the case that at the present an allowance of some like amount would be proper. I, therefore, am filing this petition, and am asking for an allowance of $12,500.00 at the present time upon account of the fees. Your Honor can fix the fees at your leisure. I think these should be fixed on the percentage basis. This amount would be less than Five Dollars apiece, about Four-Fifty or Fifty-Eight from each of the people who have been benefited by the services. I would also leave in the treasury more than sufficient to declare a ten per cent dividend to these crdeitors, and I may say personally that I see no reason why a dividend should not be declared at any time your Honor deems proper. You can suspend the payment of the dividend so far as those people are claiming under the statutes out of the State, and about $12,500.00 will help an attorney to get along especially after he has been out of money as I have been in this case. I submit this and make the motion.

"The Court: All right. Let the record show it is submitted." (Italics supplied).

Every order or decree in a suit in equity is considered in connection with the pleadings, or, as here, the petition, and, if the order is broader than the petition, the order will be limited by construction so that its effect shall be only such as required by the issues thus made.

Reynolds v. *Stockton,* 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

Barnes v. *Chicago, etc. Railway,* 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

Standard Oil Co. v. *Missouri ex rel. Hadley,* 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760.

In *Reynold's* v. *Stockton,* supra, the rule is stated by the Supreme Court as follows:

> "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. * * *" (35 L. Ed. 468).

In *Barnes* v. *Chicago,* supra, the Supreme Court said:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. Railroad Co., 3 Wall, 704 (18 L. Ed. 247)."

In *Standard Oil Co.* v. *Missouri ex rel,* supra, the Supreme Court said:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based. * * *"

These decisions of the Supreme Court were invoked by Judge Sawtelle, while sitting as District Judge, in the case of:

> *Clark* v. *Arizona Mut. Savings & Loan Assn,* 217 Fed. 640; cert. den. 238 U. S. 628, 35 Sup. Ct. 791, 19 L. Ed. 1496; affirmed by this Court in:
>
> *Farmers' & Merchants' Bank* v. *Arizona Mut. Savings & Loan Ass'n,* 220 Fed. 1

See also:

> *Drilling & Exploration Corporation* v. *Webster,* 9 Cir., 69 Fed. 2d 416, 418.

After this Court reviews the petition filed by appelant on October 15, 1937, and the oral statements made by him at the time the petition came on for hearing on December 20, 1937, together with the supplemental petition in writing filed at that time, we respectfully suggest that it will appear that the issue then presented did not support the order entered on December 7, 1942, and that consequently the trial court did not have jurisdiction to render, at that time, a final order depriving appellant of compensation he did not then claim or support, and upon which he had not been heard. Furthermore, appellant then reserved the right to claim additional compensation for services rendered in the creditors' suit.

It is significant that the trial court allowed and awarded appellant by the order of December 7, 1942, the amount he then claimed, $12,500.00, but less the amount he had previously received.

III.

The trial court entertained the petition filed by appellant on March 31, 1944 to review the order en-

tered December 7, 1942. The power was lodged in the trial court to entertain the petition, and, having exercised that power, the trial court failed to exercise a sound judicial discretion by not correcting the erroneous and unconscionable order entered December 7, 1942.

(Specification of Errors V, VI and VII, p. 18, supra.)

We have seen that no legal impediment inhibited the trial court from reviewing, out of time, the order previously entered in this administrative proceedings. Here the trial court actually opened the order entered December 7, 1942 by entertaining, considering and disposing of the petition filed March 31, 1944 to rehear and review that order. It was then apparent from the decision of this Court in *Monaghan* v. *Hill* that the trial court had erred in the award made to appellant on December 7, 1942. The trial court had the power to correct the error of that order and failed to exercise a sound judicial discretin by refusing to do so. The power of the trial court, as we have shown, to correct the erroneous order entered December 7, 1942 flowed from the rule exemplified by the decisions of the Supreme Court which we have heretofore cited.[7]

Aside from those decisions, Rule 60 (b) of the Rules of Civil Procedure, 28 USCA, following section 723 (c), provides as follows:

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[7]*Bowman v. Lopereno,* 311 U. S. 262, 85 L. Ed. 177, 61 S. Ct. 201.

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557, 57 S. Ct. 382.

Pfister v. Northern Illinois Co. 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceedin six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not effect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding,* or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified. (Italics supplied).

The italicized exception contained in the last sentence of the foregoing rule imposes no limitation of time upon the power of the lower court to entertain an action[8] to relieve a party from a judgment, order or proceeding. Thus, the trial court retained its inherent power to correct its order entered December 7, 1924, especially in an administrative proceeding in equity not closed.

Bucy v. *Nevada Construction Co.* 9 Cir., 125 Fed. (2d) 213.

In that case, the District Court of Idaho remanded an action which had been removed from the state court. The order for remand was entered on November 27, 1939. Subsequently the Supreme Court

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[8]The word "action" written into the rule is broad enough to embrace this proceeding. See: *Fiske v. Buder,* 8 Cir., 125 Fed. 2d 841, 844; *Cavallo v. Agwilines,* 2 F. R. Dec. 526.

in a different action rendered a decision in conflict with the decision of the District Court ordering the remand. On December 1, 1939, the District Court, on its own motion, vacated the order to remand. This Court on appeal sustained the order of the trial court vacating the order for remand, discussed Rule 60, supra, and said:

> "This rule of the United States District Court for Idaho states that the procedure shall be as prescribed in the General Rules of Civil Procedure for the District Courts of the United States. Rule 60 of these General Rules, 28 U.S.C.A. following section 723c, the Advisory Committee's notes thereon, and particularly the discussion appearing on page 185 of the Proceedings of the Institute at Washington, D. C., October 6, 7, 8, 1938, as published by the American Bar Association, support the theory of the inherent power of courts to correct their own errors.
>
> "As pointed out in the discussion of the Institute, this Rule 60 does not affect, interfere with, or curtail the common-law power of the federal courts, but as was emphasized, the broad power, which was theirs by the common-law, to deal with the situation where, in justice and good conscience, relief should be granted from manifest error, remained inherent in the courts.
>
> " 'The power to vacate judgments was conceded by the common-law to all its courts. Within its proper limitations it is a power inherent in all courts of record and independent of statute. It may be exercised by the court either of its own motion or on motion or suggestion by a party or interested person.* * *' 1 Freeman on Judgments, par. 194, pp. 375, 376."

See also:

> *Bateman* v. *Donavan,* 9 Cir., 131 Fed. (2d) 759.

In that case the trial court granted a new trial. Forty-seven days later the opposite party, by motion, attacked the order granting a new trial and the trial court set aside the order. In sustaining the later action of the trial court, this Court said:

> "* * * Appellee, in his motion filed forty-seven days later, attacked the propriety of the trial court's granting of a new trial upon a consideration of the juror's affidavit. In granting this motion of appellee and setting aside the order for a new trial the judge reasoned that there was not presented a proper case in which the affidavit of a juror might be received, on motion for a new trial, for the purpose of impeaching the verdict.
>
> "First of all, did the District Court have power to reconsider its order granting a new trial? Without citation of any authorities appellant questions the action of the Court. It is true, as pointed out by him, that the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, make no provision for such action, but it is likewise true that they do not forbid it. As illustrating the power of a federal trial court over its decrees and orders, we invite attention to the well-known principle that the court may vacate even final decrees at any time within the term (which principle remains unchanged under the new Rules, National Popsicle Corp. v. Hughes, D. C., 32 F. Supp. 397).* * *"

Let us assume that the trial judge, through inadvertence or mistake, had awarded appellant compensation in an amount more than he was entitled to receive. We do not think it could be successfully contended that the trial court could not have, under such circumstance, corrected the error and required appellant to pay back to the receivership estate the

amount of the over-payment. This Court has said that it may be done.

> *Drilling & Exploration Corporation* v. *Webster,* 69 Fed. (2d) 416, 418.

That was a receivership proceedings. The trial court ordered the attorney for the receiver to repay to the receivership estate an over-payment which had been made by the receiver, and this Court sustained that order.

And, conversely, the same power was lodged in the trial court to correct the order entered December 7, 1942, because, regardless of how the order was characterized, nevertheless it was an administrative order in equity subject to change or correction by the trial court.

Upon this question the court in *Drilling & Exploration Corporation* v. *Webster,* supra, (p. 418) said:

> "Furthermore when a court of equity appoints receivers of corporate property, its allowance to its receivers and their attorneys is an administrative order, presumptively right as to the justice of the allowance, and since orders for such allowances are purely administrative, they are subject to entire disallowance or change by either increase or decrease with the development of the administration. Hume v. Meyers (C.C.A.) 242 F. 827, 830."

Observing, therefore, that the trial court was vested with plenary power to correct the order entered December 7, 1942, it is difficult to understand why the trial judge did not do so after entertaining the petition filed March 31, 1944.

The directive of this Court in *Monaghan* v. *Hill* points as authoritatively to the inadequacy of the

award which the trial court made to appellant as it does to the inadequacy of the award which that court made to Mrs. Monaghan. The disinclination of the trial judge to adequately compensate appellant finds no support in an unilateral record which conclusively discloses that appellant deserves more by far than he was allowed. The obvious result is that the trial court, by denying adequate compensation to appellant, unjustly enriched the receivership estate.

This Court is now authorized to review the error of the trial court apparent not only from the order entered December 7, 1942, but also from the order entered November 29, 1944, and to correct the errors of those orders and to direct an award which adequately compensates appellant for his services.

In re Bowman, 9 Cir., 118 Fed. (2d) 742.

IV.

The acceptance by appellant of the compensation awarded to him by the order entered December 7, 1942 does not now estop appellant from claiming additional compensation for services rendered which appellant claimed in the petition filed March 31, 1944.

(Specification of Error VIII, page 18, supra)

We have seen that appellant at the time he filed the petition on October 15, 1937 which came on for hearing December 20, 1937, then requested an award on account in the amount of $12,500.00, and that appellant, at that time, reserved the right to claim additional compensation for services performed for the petitioning creditors in the class suit. Appellant did not then claim compensation for services performed for the receiver, and in the ancillary receiver-

ships, but claimed compensation for those services for the first time by the petition filed on March 31, 1944 to review and rehear the order entered December 7, 1942. (R. 599).

By the fifth, sixth and seventh defenses set up in the answer filed by appellee, as receiver, to the petition filed by appellant on March 31, 1944 (R. 639-641) appellee pleaded payment to appellant of the award made by the order entered December 7, 1942. Payment was made by the receiver's check, a copy of which is pleaded in the answer. (R. 642). The check was dated December 10, 1942, and was drawn by the receiver to the order of appellant in the sum of $6,330.40. This sum represents the award of $12,500.00 made by the order entered December 7, 1942, less $7,500.00, which had theretofore been paid to appellant,[9] plus $1,330.40 for appellant's expenses allowed by the order entered December 7, 1942. (R. 245).

Appellant, by the issues formulated on the pretrial conference, admitted payment of the receiver's check, but denied that the payment deprived appellant of the right to claim additional compensation as was claimed in the petition filed March 31, 1944. (R. 650).

Under the circumstances disclosed by the record on this appeal, acceptance by appellant of the award made December 7, 1942, did not deprive appellant of the right to claim additional compensation for services rendered to the petitioning creditors in the class suit, and also for services rendered to the receiver, and in the ancillary receiverships, as appel-

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[9]The amount which had been paid to appellant was not a salary as the order recites (R. 245) but was paid on a drawing account under a prior order of the Court. (R. 385, 386).

lant did claim in the subsequent petition filed March 31, 1944.

The order entered December 7, 1942 in this administrative proceedings in equity was subject to review by the trial court, and the amount awarded to appellant by that order can be increased or decreased before the proceedings are closed as the circumstances warrant.

Drilling & Exploration Corporation v. *Webster,* 9 Cir., 69 Fed. (2d) 416.

The trial court entertained the petition filed by appellant on March 31, 1944 to review and rehear the order entered December 7, 1942. That order, in its entirety, was then placed under review by the trial court and was subject to correction as the circumstances then required.

The acceptance of the amount of the award made by the order entered December 7, 1942 did not impair the power of the trial court to correct that order when it came under review. The trial court had the power, if it then appeared that appellant had been over-paid as the result of inadvertence or mistake, to require appellant to refund to the receivership estate the amount of the over-payment, and the trial court had the correlative power to increase the award made as the result of error, as here.

Payment was no insurmountable bar to a revision of the order entered December 7, 1942, for certainly there can be no distinction between requiring a refund of payment received by an attorney in a receivership proceedings and ordering an increase of an award theretofore made to an attorney in a receivership proceedings through error.

Drilling & Exploration Corporation v. *Webster,* **supra.**

While we think the rule of this Court announced in the decision last cited is sufficient to dispose of the defense of payment asserted by appellee in the answer, nevertheless an additional reason supports the contention of appellant that the acceptance of the award made by the order entered December 7, 1942 does not estop appellant from claiming such additional compensation as may be just and proper as now disclosed by this record on appeal.

The receiver's defense that appellant by accepting the benefits of the order entered December 7, 1942 is now estoped from claiming additional compensation is not sustained simply by the assertion of that defense. The rule that the acceptance of the benefit of a judgment or order forecloses a review of them is subject to qualifications or exceptions, one of which is that the acceptance by appellant of that which confessedly he was entitled to, does not estop him from claiming that which is justly due him. The exception to the rule which is applicable here is found in the following decisions of the Supreme Court:

> *Embry* v. *Palmer,* 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346, citing United States v. Dashiel, 3 Wall. 688.
>
> *Reynes* v. *Dumont,* 130 U. S. 354, 9 S. Ct. 486, 32 L. Ed. 934.
>
> *Erwin* v. *Lowry,* 7 How. (48 U. S.) 172, 184, 12 L. Ed. 655.

Embry v. *Palmer,* supra, involved an action wherein Embry, as administrator, secured a judgment in the Supreme Court of the District of Columbia against Palmer and Stanton for $9,185.18 for claims recovered by his intestate against the United States in favor of Palmer and Stanton. Subsequently Embry brought suit against the judgment debtors in the

Superior Court of Connecticut where they resided. The judgment debtors filed a petition in the same court to restrain Embry from enforcing the judgment on their payment of $2,296.29, which they alleged was the only amount Embry was equitably entitled to receive. The issue reached the Supreme Court of Errors of Connecticut which granted relief to Palmer and Stanton on condition that they pay to Embry said sum of $2,296.29. That amount was paid to and accepted by Embry's attorney and the Supreme Court of Errors of Connecticut then enjoined Embry from further prosecuting his main suit for the amount of the judgment obtained in the District of Columbia. Embry had a writ of error to the Supreme Court of the United States and Palmer and Stanton asserted that Embry was estopped from prosecuting the writ (using the language of the Supreme Court of the United States) "because it appears that the amount of money ordered by it (Supreme Court of Errors of Connecticut) to be paid to him (Embry) as condition of relief granted has been accepted by him." The Supreme Court rejected the contention, reversed the Supreme Court of Errors of Connecticut, and upon the question of estoppel (107 U. S. 8) said:

> "A suggestion is made in argument that Embry is estopped to prosecute this writ to the reversal of the decree below, because it appears that the amount of money ordered by it to be paid to him as a condition of relief granted has been accepted by him. It is said that this is release of errors. Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is in-

consistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him. But in every point of view the objection is met and answered by the decision of this court in the case of *United States* v. *Dashiel,* 3 Wall. 688."

In *Reynes* v. *Dumont, supra,* there was involved the question of a right to liens upon bonds to secure payment of certain drafts. The Circuit Court decreed that the liens were impressed upon the bonds and the liens were satisfied by payment. Appellants received the remaining bonds after the liens were satisfied, and it was asserted that the acceptance of the bonds disposed of the right of appeal. But the Supreme Court rejected the contention (130 U. S. 394) and said:

"We are asked to dispose of the case adversey to appellants upon the ground that they received the remaining bonds and money after the liens decreed in Fry's favor were satisfied; but such receipt does not oust the jurisdiction. The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything on the reversal of the decree, to which

they would otherwise be entitled. *Embry* v. *Palmer,* 107 U. S. 3, 8.* * *"

Appellant's case cannot be placed without the import of the foregoing decisions. He limited his petition first filed to compensation for services performed to the petitioning creditors in the class suit. Appellant amended and supplemented that petition by then requesting an allowance *on account* of $12,500.00, and reserved the right to ask for more. (R. 594). Appellant then claimed no compensation for srevices performed by him for the receiver, and in the ancillary receiverships, to which he was entitled. Thus appellant was entitled, in all events, to the amount which the trial court awarded him by the order entered December 7, 1942. That appellant is entitled to more, as he reserved the right to claim, is now established beyond dispute. *Monaghan* v. *Hill, supra.*

Armstrong v. *Lone Star Refining Co.* 8 Cir., 20 Fed. (2d) 625, exemplifies the rule in the national courts. In that case a creditor in a receivership proceeding filed his claim and claimed a preference. The lower court allowed the claim as a general one only. The creditor accepted a dividend paid on general claims, and afterwards appealed. Motion was made in the Circuit Court of Appeals to dismiss the appeal upon the claim that appellant, having accepted the dividend on general claims, was estopped to prosecute his appeal from the decree which disallowed his claim as a preferred one. The Circuit Court of Appeals rejected the contention and said:

"On July 28, 1926, the court made an order in the main suit, directing the receivers to pay a 20 per cent. dividend on general claims. The intervener was paid, and he retained, this divi-

dend on his claim. Motion is made in this court by appellees to dismiss the appeal, on the ground that appellant, having accepted the dividend, is now estopped to prosecute the appeal from the decree which allowed his claim and in accordance with which his dividend was paid.

"The well-settled rule that a party who enforces, or otherwise accepts the benefits of a judgment, order, or decree, cannot afterward maintain an appeal or writ of error to review the same, is subject to numreous qualifications and exceptions. The rule has no application to a case where the appellant is concededly entitled in any event to the sum which he has received. 3 C. J. 682, par. 556; United States v. Dashiel, 3 Wall. 688, 702, 18 L. Ed. 268; Embry v. Palmer, 107 U. S. 3, 8, 2 S. Ct. 25, 27 L. Ed. 346; Reynes v. Dumont, 130 U. S. 354, 394, 9 S. Ct. 486, 32 L. Ed. 934; Carson Lumber Co. v. St. L. & S. F. R. Co., 209 F. 191 (C.C.A. 8); Snow v. Hazelwood (C.C.A.) 179 F. 182. This exception to the general rule is recognized in the cases cited by appellees. Spencer v. Babylon R. Co. (C.C.A.) 250 F. 24; In Re Minot Auto Co., 298 F. 853 (C.C.A. 8).

"In the case at bar the face amount of the claim of intervener is undisputed, and its validity as a general claim is also undisputed. Whether intervener succeeds on his present appeal or not, he will be entitled to share with the other creditors, at least on the basis of the allowance of his claim as a general one. This being the situation, the intervener is within the exception noted to the general rule above stated. The motion to dismiss the appeal must therefore be denied."

To the same effect are:

Idaho Irrigation Dist. v. *Gooding,* 9 Cir., 285 Fed. 453, 461.

Snow v. *Hazelwood,* 5 Cir., 179 Fed. 182.

Words of limitation or condition written by the receiver into his check cannot impair or destroy the legal effect of the order under which the check was written. The receiver is the arm of the court. Consequently in the present case he stands not in the relationship of judgment creditor in the sense that he may invoke that relationship against appellant as a judgment debtor. On the contrary the receiver's check, regardless of recitals, like the order under which it was written, was under the continuing control of the trial court so long as the receivership proceedings were not closed.

CONCLUSION

The professional efforts expended by appellant, and the fruits of those efforts, present a case, we think, that justifies redress by the remedies invoked below and here. The remedies, and the epitome of the argument to sustain them, find their source in a principle of equity which is crystalized in the maxim that equity will not suffer a wrong to be without a remedy. Appellant is content to rest his case upon that principle as exemplified by the authoritative decisions which are cited on the preceding pages.

It is respectfully prayed that the orders of the trial court appealed from be reversed and remanded with direction that the trial court order payment to appellant from the receivership assets such sum as appears to this Court adequate for all the services rendered.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant.

THOMAS W. NEALON,
In Propria Persona